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Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

No. 91-1295

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES WAYNE ELMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge committed plain error by admitting statements made by petitioner's wife establishing that petitioner had a motive to murder his wife.

2. Whether petitioner was denied a fair trial due to a dinnertime contact between a government witness and the court-martial panel members in petitioner's case.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 2a-25a, is reported at 33 M.J. 387. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 26a-48a, is reported at 31 M.J. 678.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1991. A request for reconsideration was denied on November 12, 1991. Pet. App. 1a. The petition for a writ of certiorari was filed on February 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a Navy third class petty officer, was tried by a general court-martial and convicted of the premeditated murder of his wife in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918. Petitioner was sentenced to confinement for life, a dishonorable discharge, total forfeiture of pay, and a reduction in rank. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. a. Petitioner was a member of the station boat crew at the Harold E. Holt Naval Station in Exmouth, Australia. By March 1988, he had been married to his wife, Bella, for six months, although they had lived together for three years. Tr. 272, 875; Pet. App. 4a. Petitioner and Bella had a history of arguing over money, Tr. 846, 995, and their disagreements sometimes resulted in physical abuse. Tr. 876, 907-908, 946-947. On occasion, petitioner was heard to say that his marriage to Bella had been a mistake, that he wanted to divorce her, and that he wanted to kill her. Tr. 875, 877, 908-909.[1] Early in March, petitioner and Bella had a "particularly vocal, crude, and public argument," Pet. App. 5a, apparently because petitioner believed that Bella was having an affair. Tr. 803, 807, 814, 817.

On March 16, petitioner and Bella went bowling with friends and then to an on-base club for drinks. Tr. 807-808, 830. Before leaving the club, Bella telephoned a friend and indicated that she and petitioner had been fighting. Tr. 953. Petitioner and Bella were seen leaving

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[1] Specifically, petitioner stated on several occasions that he wanted to "cut [Bella] up for shark bait and throw her off the [Navy] pier [at Exmouth]." Tr. 877, 909. Petitioner claimed at trial that those statements were intended as jokes. Tr. 1262.

the base and heading toward their home at about 10:30 that evening. Tr. 672. They were seen driving toward the Navy pier at Exmouth approximately five hours later, between 3:30 and 4:30 the morning of March 17. Tr. 787-789. Bella was never seen again. Several hours later, petitioner began making inquiries to friends as to Bella's whereabouts, Tr. 832, and he reported her as missing on March 18. Tr. 272.

Between March 17 and the time of his testimony at trial some four and one-half months later, petitioner told four different versions of what happened the night Bella disappeared. Pet. App. 29a-31a.[2] Within one month of her

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[2] In petitioner's initial version of events, told to friends and U.S. military and Australian authorities in the days immediately after Bella's disappearance, petitioner stated that he and Bella went home after leaving the club on March 16 and he went right to bed. When petitioner awoke the following morning, he said, Bella was gone. Tr. 273, 304-305, 436-437, 880-881.

Petitioner gave a second version to the Australian police approximately ten days after Bella disappeared. Tr. 426. In that version, petitioner said that he and Bella had a heated argument upon returning home from the club and then went for a drive to resolve their differences. Tr. 438-439. They drove to the Navy pier at Exmouth at approximately 1:00 in the morning, where they continued to argue. Tr. 440. According to petitioner, he became annoyed, left Bella at the pier, and returned home. Tr. 441. Petitioner also claimed to have seen Bella walking alongside the road as he drove to work later that morning, but he neither offered her a ride nor spoke to her at that time. *Ibid.*

In the third version, which petitioner gave when confronted by the police with inconsistencies in the second version, Tr. 442-443, petitioner stated that, while he and Bella argued at the pier, Bella walked to the edge of the pier, to a point where there was a gap in the rail. Tr. 443, 447. As petitioner walked toward her, "she just fell over the rail." Tr. 443. Thinking that "she would swim in" from waters that he knew (from his job responsibilities at the pier) to be shark infested and generally unnavigable, petitioner returned home and went to bed. Tr. 277-278, 443, 882, 1035-1037.

disappearance, a pair of shorts and a bloodstained bedspread subsequently identified as Bella's washed ashore not far from the pier. Tr. 798-799, 821-822, 950-951, 957, 998; PX 45. Several other bloodstained items, including a bedsheet, a pair of jeans, a knife, and a mattress pad, were found in petitioner's home and tested positive for human venous blood. Tr. 371, 376, 622-623, 694, 741-742, 745-747, 749-751.[3] The police also discovered, in the bathroom trash can in petitioner's home, a shredded note in which Bella expressed her feeling that her marriage had been a mistake and that her safety was endangered. Tr. 562-

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Finally, at trial, petitioner claimed that he and Bella left the pier and drove to a lighthouse several miles away where they continued their argument for approximately two hours. Tr. 1276-1278. They then returned to the pier, at which point Bella fell into the water. *Ibid.* In the fourth version of his story, petitioner claimed to have searched for Bella in the area around the pier, including the catwalks beneath it, for 30 to 45 minutes before giving up and going home. Tr. 1284.

[3] While Bella's bloodtype was not established at trial, the blood on the items seized from the home was determined to be type A positive. Tr. 741, 747, 749, 752. Petitioner's bloodtype is O factor positive. Tr. 750. Further, while it is true that the defense's expert witness characterized as "unreliable" the test used by the serologist in determining that the bloodstains were not caused by menstrual blood, Tr. 1202-1203, the defense expert acknowledged that the differentiation between venous blood and menstrual blood "has not been undertaken in Western Australia," Tr. 1201, that he never performed the test utilized by the serologist, Tr. 1219, that he lacked the expertise to do so, Tr. 1217, and that he made his conclusions about the test based on materials he read the week before petitioner's trial, Tr. 1217-1218. Both the serologist and a second government expert, on the other hand, were familiar with the test, and both of them said that any unreliability associated with the test occurs only when it yields a positive result for menstrual blood. Tr. 696, 744-745. Since the tests in this case yielded a positive result for venous blood, both experts agreed that the test results were reliable. *Ibid.*

563; PX 42. Finally, while two residents of Perth claimed to have seen a woman resembling Bella one week after she disappeared, their descriptions of that individual were significantly different from the descriptions of Bella given at trial. Pet. App. 48a. The government also established at trial that Bella was not listed as a passenger on any buses or airplanes that left the Exmouth area during the pertinent period. GXs 61-62, 72; Tr. 267, 857, 1017, 1021, 1031.

b. At trial, the defense moved in limine to suppress approximately 40 statements made by Bella to her friends about her fear of petitioner, his threats to kill her, and his physical abuse of her. AX 7; Tr. 40. While he suppressed most of the statements, the trial judge declined to suppress ten of them, Tr. 164, 166-169, 171-173, because he was "inclined to allow the government to establish a motive by some kind of indication that there was some discord within the marital relationship." Tr. 159. He invited defense counsel, however, to renew his objections if the government attempted to introduce the statements during the trial on the merits. Tr. 161.

During its case in chief, the government introduced petitioner's pretrial statements to the police, which included the assertion that he and Bella had a harmonious relationship. Tr. 305, 436-437, 570-571. The government also offered the testimony of witnesses who had observed just the opposite. Tr. 803, 807, 876-877, 907-909. During cross-examination of one of those witnesses, the defense asked for a description of the degree of affection in petitioner's marriage. The witness responded that petitioner and Bella had displayed a greater degree of affection than that in her own marriage. Tr. 920. The prosecutor then signaled his intention to introduce the ten statements that had not been suppressed in limine, arguing that they were not being offered for the truth of the matter asserted, but to show Bella's state of mind, particularly her

fear of petitioner. Tr. 934. The prosecution also argued that the statements were admissible to rebut the implication that petitioner and Bella had an affectionate marriage, and the defense agreed that the door had been opened. *Ibid.* The trial judge then instructed the court-martial panel members that they were to consider the statements for the limited purpose of determining Bella's state of mind "as it went to their marital status." Pet. App. 17a; Tr. 942.

c. Because petitioner's trial was held in Exmouth, a remote town with limited public accommodations, the panel members and the serologist testifying for the government were all lodged at the same hotel. Tr. 85-86.[4] As a result of the hotel restaurant's policy prohibiting patrons from occupying a table by themselves, the serologist sat with the panel members during dinner after the first day of trial. Tr. 141. Upon learning of that contact between the witness and the panel members, the trial judge voir dired both the serologist and the panel about their dinner conversation. According to the serologist, he was unaware that he was dining with panel members at the time, and nothing about petitioner's case was discussed. Tr. 137-139. Voir dire of the panel members confirmed that the case was not the topic of any conversation and that the members were not influenced in any manner by their contact with the witness. Tr. 85-86, 91, 98-99, 105-106, 113-114, 119, 123-124. At the conclusion of voir dire, the defense challenged the entire panel for cause based on the ex parte communication. Tr. 145. The trial judge denied the challenge because the "casual dinner conversation" did not include "discussion of any issues relevant to this case." Tr. 149.

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[4] Most of the panel members traveled to Australia from Hawaii for the court-martial. Tr. 22.

2. The court of military review affirmed. Pet. App. 26a-48a. It found that Bella's statements[5] were admissible because they "tend[ed] to rebut the description of the state of [petitioner's] marriage as testified to by Bella's friend upon cross-examination by civilian defense counsel, who thus opened the door and acknowledged that the door was opened." *Id.* at 39a. The court also found that the defense waived any objection to the statements and that any error in admitting the statements was harmless given the "substantially similar testimony given by other witnesses during the trial." *Id.* at 39a, 40a, 41a.

With regard to the pretrial contact between the government expert witness and the panel members, the court found that the government successfully rebutted by a "clear and positive showing" the presumption of prejudice the contact created. Pet. App. 45a (citing *United States* v. *Adamiak*, 4 C.M.A. 412, 15 C.M.R. 412 (1954)). Specifically, the court concluded that the discussions at dinner, including the serologist's description of his background, "did not relate to either the expertise involved in [petitioner's] case or anything relevant to the offenses in general. Instead, they were oriented toward a more casual and general conversation." *Ibid.* Accordingly, the court concluded that petitioner was not prejudiced. *Ibid.*

3. The Court of Military Appeals affirmed. Pet. App. 2a-25a. The court found that some of Bella's statements were admissible under the state-of-mind hearsay exception, and that the remaining statements, which recited petitioner's prior threats and assaults against

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[5] In addition to the ten statements identified in the defense's motion in limine, appellate defense counsel specified two additional statements that they argued were erroneously admitted at trial. Pet. App. 25a.

Bella, were not hearsay, because they were not offered for their truth, but instead to show Bella's view of the status of her marriage to petitioner. *Id.* at 19a-20a. The court held that the status of petitioner's marriage was relevant and was "thrust * * * into issue" from the outset by both the prosecution and the defense. *Id.* at 21a. According to the court, the government introduced evidence of petitioner's abuse of, and contempt for, Bella to show motive, intent, and premeditation, and the defense sought to engage in "damage control" by showing that the marriage

> still retained a degree of affection—and certainly the marital condition was no incentive to murder. * * * Further, we agree that the mere fact that [Bella] was going about making all these terrible accusations against [petitioner], if believed, tended to rebut the relatively-harmonious-marriage stance taken by the defense.[6]

Ibid. (citing *Lock* v. *State*, 567 N.E.2d 1155 (Ind. 1991)). Further, the court found that the statements were not prejudicial given that they were "largely redundant of other evidence already in the record." Pet. App. 23a. As a result, the court held that it was not plain error for the military judge to admit the statements. *Id.* at 22a.

With regard to the dinner contact between the government witness and the panel members, the court agreed with the court of military review that

> the prompt and thorough investigation superintended by the military judge clearly established that the inadvertent contact between the witness and the court members did not in fact prejudice [petitioner]

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[6] The court also stated that "the fact that the victim was going about saying these things actually supported the defense theory that she had finally seized the opportunity to make her escape from [petitioner]." Pet. App. 24a.

> or taint the proceedings in any way, appearances notwithstanding. We are confident that the court members were able to evaluate the testimony and opinions of the witness * * * without bias or predisposition.

Pet. App. 15a.

ARGUMENT

1. Petitioner maintains that the trial judge erred by admitting statements made by his wife as to her state of mind. Pet. 7-15. That claim does not warrant review by this Court.

Petitioner asks this Court to decide whether a trial judge may admit the statement of a murder victim regarding her fear of her assailant before she was killed. This case does not present that question, however, because petitioner did not object at trial to the admission of Bella's statements, Pet. App. 16a-17a, 22a, 39a, as petitioner concedes, Pet. 15. For that reason, petitioner has waived his claim that the admission of Bella's statements was erroneous. See Mil. R. Evid. 103(a)(1), (d). He can prevail only if he can prove that the admission of Bella's statements was plain error. The standard for establishing plain error, however, is a rigorous one. The plain error rule "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). The rule may be used "to correct only 'particularly egregious errors,' those that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *Frady*, 456 U.S. at 163, and *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). A reviewing court must "find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact" on the trial. *Young*, 470 U.S. at 17

n.14. In sum, petitioner must prove that a fundamental error adversely affected the result of his trial. Given the government's proof of petitioner's guilt and, in particular, petitioner's highly incriminating succession of inconsistent admissions and recantations,[7] petitioner cannot meet that standard.[8]

The decision below does not conflict with *United States* v. *Brown*, 490 F.2d 758 (D.C. Cir. 1973). To begin with, the defendant in *Brown* objected to the use of the victim's statements, and the court addressed the question of when such statements are admissible over a defense objection. The court did not hold that admission of such statements is always error, much less plain error. Moreover, *Brown* held that such statements are

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[7] As the Court of Military Appeals explained in connection with petitioner's claim of ineffectiveness of trial counsel, Pet. App. 23a: "[Defense] counsel had a horrible set of facts to contend with. Through [petitioner's] successive recantations and admissions, he had established one of the most remarkable examples of consciousness of guilt this Court has ever seen. Further, on his own, [petitioner] had established a motive, an opportunity, and the capability of committing the offense; he placed himself at the scene of the crime; he tendered an implausible, transparent, and self-serving claim of innocence; and he highlighted his destruction and concealment of evidence and his deliberate misdirection of the search for his wife. Coupled with the physical evidence that escaped [petitioner's] cleanup measures and the third-party witnesses, counsel faced a daunting challenge."

[8] In fact, this case involves more than a simple failure to object to the admission of evidence. As the court of military review explained, at trial the defense "admitted that it had opened the door for the admission of these * * * statements." Pet. App. 39a. "In addition," as the Court of Military Appeals observed, "the fact that the victim was going about saying these things actually supported the defense theory that she had finally seized the opportunity to make her escape from [petitioner]." *Id.* at 24a. For these reasons, petitioner is in no position now to complain about the admission of Bella's statements at trial.

admissible if they are relevant to an issue in the case and proper limiting instructions are given. 490 F.2d at 773-774. Here, Bella's statements were admissible on the ground that they rebutted any claim that petitioner and Bella had a harmonious marriage, as the Court of Military Appeals explained, Pet. App. 20a, and the defense did not object at trial to the trial judge's limiting instruction, *id.* at 17a.[9] Finally, the Court of Military Appeals did not disagree with the decision in *Brown*; on the contrary, the court stated that "[i]n principle, we have no disagreement with *Brown*." *Id.* at 20a. Accordingly, the decision below does not conflict with *Brown*.[10]

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[9] Petitioner claims that "[t]he state of mind exception was not an *alternate* theory of admissibility [but] * * * the *only* [theory]," Pet. 9; that the Court of Military of Appeals erred in not reviewing the statements for that limited purpose; and that the challenged statements were "the only evidence from which to infer an intent to kill," Pet. 12. In fact, the theory of relevance that the Court of Military Appeals embraced—that the statements were relevant because they bore on the question whether petitioner's marriage was harmonious—was the focus of attention in all three courts. During the motion in limine, the trial judge clearly stated that evidence of discord within the marriage would be admitted to show motive. Tr. 159. After ruling that the government could present Bella's statements during the government's case-in-chief, the judge instructed the panel members that they could consider those statements "for the limited purpose of establishing what her state of mind was—whether or not she feared the accused *and as it went to their marital status*. You may not consider the evidence for any other purpose[.]" Tr. 942 (emphasis added), quoted at Pet. App. 17a. In addition, because "substantially similar testimony [was] given by other witnesses during the trial," Pet. App. 40a; see Tr. 803, 807, 817, 845-846, 876-877, 908-909; see also GXs 42, 54, petitioner errs in claiming that the challenged statements were the government's only proof of intent to kill.

[10] There is no merit to petitioner's claim that admission of Bella's statements violated the Confrontation Clause. Pet. 7. This Court held in *Tennessee* v. *Street*, 471 U.S. 409 (1985), that the

2. Petitioner maintains that he was denied a fair trial due to the dinner contact between the government's serologist and the court-martial panel members on the first day of trial.[11] According to petitioner, the courts below erred in determining that the government rebutted the presumption of prejudice created by that contact. Pet. 16-18.

The Court of Military Appeals was correct in holding that the contact between the witness and the panel members did not prejudice petitioner or taint the court-martial proceedings. Pet. App. 15a. That holding does not conflict with *Remmer* v. *United States*, 347 U.S. 227 (1954), as petitioner maintains, Pet. 16. *Remmer* held that extrajudicial communications are presumptively prejudicial and that the government must prove that such contacts are harmless. 347 U.S. at 229. In this case, the Court of Military Appeals applied the same standard, based on its own prior decision in *United States* v. *Adamiak*, 4 C.M.A. 412, 15 C.M.R. 412 (1954). That decision acknowledged that such contacts are "absolutely forbidden" and that the government must show that the contacts "did not and could not operate in any way to influence the decision [of the court]." 4 C.M.A. at 417-418, 15 C.M.R. at 417-418. Accordingly, the Court of Military Appeals applied the correct standard in evaluating petitioner's claim.

Moreover, the trial judge was "ever watchful" with regard to the possibility of prejudice, *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982), and conducted a full inquiry to

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Confrontation Clause does not bar the admission of nonhearsay statements made by a declarant who does not testify at trial.

[11] Petitioner's claim, Pet. 6, that the serologist ate breakfast with the panel members on the second day of trial is not supported by the record. Voir dire of the members established that the serologist only approached the members' table as they were leaving and that no conversation ensued. Tr. 113.

ensure that none occurred, Tr. 74-145. During that hearing, the government established that the panel members' conversations with the serologist did not affect their view of his testimony or any other aspect of the case, primarily because nothing about petitioner or his case was discussed. Tr. 85-86, 91, 98-99, 105-106, 113-114, 119, 123-124. The government also established that the only information the serologist told the panel members about himself was background information that he subsequently testified about on direct examination. Tr. 737-739.[12] In sum, although the contact between the members and the witness was unfortunate, it was also "inadvertent," Pet. App. 15a, and petitioner was not prejudiced by it.[13]

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[12] Given the size of the community in which this trial was to take place and the pretrial publicity that this case generated, the trial judge had been concerned about extrajudicial influence from the moment that petitioner elected to be tried by a court-martial panel, instead of by the court. Tr. 18, 20-21, 31. As a result, the members were instructed prior to arriving in Exmouth about the importance of avoiding discussion of the case with anyone. AE 6. According to the senior member of the panel, "[the members] were all aware that we were not * * * to discuss the case with [the witness]." Tr. 85. Moreover, unlike civilian jurors, who are chosen randomly, the court-martial panel members were commissioned officers and were selected to perform the function of trier of fact by "reason of age, education, training, experience, length of service, and judicial temperament." Art. 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2).

[13] Further, as noted by the court of military review, "the member whose memory of the conversation most supported the defense assertion of prejudice[,] was successfully challenged off the court by the defense * * * [W]ith regard to this member's memory, no other court member's memory was in any way similar." Pet. App. 45a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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